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State of Utah v. Neil Dixon : Brief of Respondent

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

NEIL DIXON,
Defendant-Appellant.

Case No. 13649

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JOSEPH G. JEPPSON, JUDGE, PRESIDING.

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of second degree robbery (R. 194-195). The charges were tried before a jury with the Honorable Joseph G. Jeppson presiding in the Third District Court for the State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, Neil Dixon, was found guilty by a jury (R. 194-195) of the crime of robbery on February 26, 1974; and was sentenced to the Utah State Prison to serve an indeterminate term of one to fifteen years as prescribed by law.

RELIEF SOUGHT ON APPEAL

The respondent submits that the judgment of the Third District Court should be affirmed.

STATEMENT OF FACTS

In the early morning of December 8, 1973, shortly after midnight (R. 60), Jack D. Patterson, a part-time clerk at the Seven-Eleven Store located at 4657 West 5415 South, was robbed of approximately $20. The victim described the robber as a black male with a sparce, scraggly beard (R. 56-57); a nylon stocking over his face (R. 56); and wearing a blue stocking cap (R. 56), green field jacket (R. 56), and carrying a pearl handle .22 caliber revolver (R. 60). The assailant fled on foot behind the store (R. 63).

Patterson immediately phoned the Salt Lake County Sheriff's Office (R. 63) who in turn dispatched law enforcement personnel (R. 83-84). In light of the fact that few black people reside in the area of the robbery (R. 86, 88-89, 108), patrol cars were sent to cover all principle eastern and northern routes (R. 94). Within minutes the appellant, a passenger in a motor vehicle (R. 100), was identified by Officer David M. Kelley at a distance of 25 feet with the assistance of his automobile lights (R. 100) at the intersection of 3500 South and Redwood Road (R. 100), as the suspect who committed the robbery. Officer Kelly called for additional police assistance and stopped the suspect after determining that the passenger of the vehicle matched the description of the

suspect in the armed robbery (R. 100). After stopping the automobile the officer noticed that the stocking cap (R. 102), pearl handled gun (R. 103, 112), and coat (R. 104) of the suspect matched the description of the assailant involved in the robbery and the appellant was subsequently arrested (R. 104). A search was made of the car in which the appellant was riding after he was placed under arrest (R. 112).

During interrogation, Sergeant Egan indicated that the appellant claimed to have been visiting with his sister-in-law's mother (R. 142) although he was unable to articulate the location of such residence (R. 171-172, 176). When questioned about the robbery the appellant stated to Officer Smith that "it won't do me a damned bit of good to tell you because you are going to throw my goddamned ass in jail anyway" (R. 128).

A short time after the robbery, the victim positively identified the pearl handled revolver at the scene of the arrest (R. 72).

The victim was photographed and booked on the day of the robbery (R. 165-66). The appellant admitted that the photograph was a reasonable facsimile of the way he looked on the night of his arrest (R. 167) and that there was nothing misleading with regord to the picture that was taken (R. 167). Thereafter, the victim was presented with a group of ten photographs on December 11, 1973, from which he identified the appellant as the individual who committed the robbery (R. 59, 119).

Gary Scott, was the other party who was driving the vehicle at the time the appellant was arrested (R. 161). The appellant admits that he has not seen Mr. Scott since shortly after his release from jail in January, 1973 (R. 162) and that he is uncertain of his address (R. 161) although knows that he is in Ogden (R. 162). The record indicates that the appellant has made attempts to locate Mr. Scott although there is no statement which would indicate what methods or efforts were employed to find hi swhereabout (R. 161, 162). The respondent also unsuccessfully subpoenaed Mr. Scott but admitted that his means were inadequate as the subpoena was merely mailed (R. 186).

ARGUMENT

POINT I.

OFFICERS KELLY AND SMITH LAWFULLY STOPPED THE VEHICLE IN WHICH APPELLANT WAS RIDING AND SUBSEQUENTLY MADE A PROPER ARREST AND SEIZURE; AND, THEREFORE, THE EVIDENCE OBTAINED THEREBY WAS PROPERLY ADMITTED BY THE TRIAL COURT.

The appellant has attacked the lower court judgment on the basis that he was convicted by the use of evidence which was obtained by an illegal search of the car in which he was riding shortly after the crime was committed. Appellant supports this argument by stating

that there was no probable cause for arrest and further cites *Gatlin* v. *United States*, 326 F. 2d 266 (D. C. Cir. 1963), as authority for his position. However, it is obvious that the racial and cultural makeup of the District of ol Columbia which played an important part in the *Gatlin* case is easily distinguishable from the community in which the robbery in question was committed. Additionally, there is controlling Utah case law on this point without resorting to federal districts or circuits outside our own.

Since Officers Kelly and Smith did not observe or have reason to believe that the automobile in question had been involved in a traffic violation, the appellant insists that the officer was required to have "probable cause" to believe that the occupants of the automobile committed a felony before he could lawfully stop the vehicle. We disagree.

The standard of probable cause is generally associated with arrests, and the law draws a distinction between arresting a person, and merely stopping or detaining him. Utah Code Ann. § 77-13-1 (1953), defines an arrest as:

> ". . . the taking of a person into custody in a case and in the manner authorized by law. . . ."

This Court listed what it considers to be the basic elements of an "arrest" in *State* v. *Beckendorf*, 79 Utah 360, 10 P. 2d 1073 (1932):

> "Notice of arrest should be given, either expressly or by implication, and without such notice, no amount of physical restraint can constitute an arrest (cite omitted). The act relied upon as constituting an arrest must have been performed with the intent to effect an arrest and must have been so understood by the person sought to be arrested. A forcible seizure of one's person, without any pretense of taking him into legal custody, does not amount to an arrest." *Id.* at 366.

See also Utah Code Ann. § 77-13-9 (1953). Clearly, the mere stopping of a person during the course of a police officer's investigation does not fulfill the above requirements, and amounts to something short of an arrest. Stopping a person is not the "taking of a person into custody," but rather a means of conducting an investigation which may lead to a subsequent arrest. At the most, a police stop can be considered the first stage of a temporary detention of an individual.

The United States Supreme Court in the case of *Terry* v. *State of Ohio,* 392 U. S. 1 (1968), made it clear that probable cause is not required before an officer may stop a person suspected of having committed a crime:

> "It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest." *Id.* at 26.

The Court further stated:

> ". . . a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." *Id.* at 22.

Numerous state court decisions have held that police steps and detentions need not be founded on probable cause. In *State* v. *Cloman*, 254 Or. 1, 456 P. 2d 67 (1969), the Oregon Supreme Court held that an officer's stopping of an automobile to determine the identity of the occupant and the vehicle was not an arrest, and could be made without probable cause. In *State* v. *Gunter*, 100 Ariz. 356, 414 P. 2d 734 (1966), the police had been informed that a driver of a certain automobile had discharged a shotgun at a gas station. The police stopped the automobile a short time later to investigate, and subsequently arrested the defendant. The defendant contested the right of the police to stop this car, and the Supreme Court of Arizona held:

> "Circumstances short of probable cause to make an arrest may still justify an investigation. Should the investigation then reveal probable cause to make an arrest, the officer may make an arrest and conduct a reasonable search incidental thereto." *Id.* at 738.

The Court of Appeals for the Tenth Circuit has

consistently held that probable cause is not required to stop automobiles. In *United States* v. *Sadler*, 458 F. 2d 906 (10th Cir. 1972), a highway patrolman stopped a car for a routine driver's license and registration check. As a result of investigation of facts learned as a result of the stop, the patrolman found that the vehicle had been reported stolen and arrested the occupant of the car. The New Mexico patrolman testified that he made the initial stop on the basis of the Colorado dealer plates which were displayed on the car and the visible damage to the trunk lid as though it had been pried open. The Court held:

> (1) "Detention for a routine automobile registration check is not, per se, illegal," 458 F.2d at 908, and
>
> (2) "Additionally, the patrolman's testimony indicated there was some basis for suspicion which would justify stopping the automobile." *Id.*

In *United States* v. *Saldana*, 453 F. 2d 352 (10th Cir. 1972), a case involving the transportation of aliens, the defendant was stopped because he had persons of "Mexican descent" with him. In *United States* v. *Fallon*, 457 F. 2d 15 (10th Cir. 1971), the defendants were stopped because they were "conspicuous." In *Welch* v. *United States*, 361 F. 2d 244 (10th Ciri 1966), the defendant was stopped because he was driving very slowly and had his head leaning to one side. In all of the above

cases, the Tenth Circuit held that the officers had a reasonable basis for stopping the defendant.

The "reasonableness" standard was discussed in the recent United States Supreme Court decision of *Adams* v. *Williams*, 407 U. S. 143 (1972). In that case, an officer had received a tip from a reliable informer that an individual in a car parked nearby was carrying narcotics and a gun at his waist. The officer approached the car to investigate and asked the occupant to open the door. The occupant rolled down the car window whereupon the officer reached into the car and removed a loaded revolver from the suspect's waistband. The individual was arrested and the car was searched. The defendant challenged the validity of his detention and arrest and the admissibility of the evidence seized. After reiterating the views previously announced in *Terry*, the Court discussed the "reasonableness" standard for stops as follows:

> "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most *reasonable in light of the facts known to the officer at the time.*" (Emphasis added.)

The Court in *Gilbert* v. *United States*, 366 F. 2d 923 (C. A. Cal. 1966), *cert. denied*, 388 U. S. 922 (1967), stated the reasonableness standards as follows:

> "There is nothing ipso facto unconstitutional in the brief detention of citizens under circumstances not justifying an arrest, for purposes of limited inquiry in the course of routine police investigations; and . . . the test of the validity of such a brief detention is whether from the *totality of the circumstances* it appears that the detention was based upon *reasonable grounds* and was not *arbitrary or harrassing.*" *Id.* at 298 (Emphasis added.)

A series of California decisions have also stressed that reasonableness may be established upon a showing that the stop and detention are not "arbitrary or harassing." See *Wade* v. *United States*, 457 F. 2d 335 (C. A. Cal. 1972); *United States* v. *Zubia-Sanchez*, 448 F. 2d 1232 (C. A. Cal. 1971); and *United States* v. *Brown*, 436 F. 2d 702 (C. A. Cal. 1970).

The facts clearly indicate that a man (later identified as the appellant) robbed the victim while employed by the previously mentioned Seven-Eleven store. The victim phoned in a description to the police and within minutes, the sheriff's office located the appellant who fit the description of the dispatcher broadcast (R. 99-100). The automobile in which the appellant was riding was stopped by law enfrocement personnel and further evidence including a stocking cap, revolver and green coat was discovered (R. 104). On the basis of these observation the sheriff's office placed the appellant under arrest and impounded the blue stocking cap

(State's Exhibit No. 2), and a green jacket (State's Exhibit No. 3), as evidence.

The previously mentioned observations clearly indicated that Officer Kelly was justified in stopping the vehicle and Officer Smith was justified in arresting the appellant. Utah Code Ann. § 77-13-3 (1953), empowers a peace officer to arrest a person without a warrant as follows:

> " . . . (3) When he has reasonable cause for believing the person to have committed a public offense, although not in his presence, and there is reasonable cause for believing that such person before a warrant can be obtained and served may: (a) . . . conceal himself to avoid arrest, or (b) destroy or conceal evidence of the commission of the offense."

See also *State* v. *Dodge*, 12 Utah 2d 293, 365 P. 2d 798 (1961).

Moreover, the rule is well-established that upon making such a lawful arrest a police officer may seize any evidence for which there is a reasonable basis to believe is connected with the suspect or under his control and would be probative of this or other crime. See *Chimel* v. *California*, 395 U. S. 752, 89 S .Ct. 2034, 23 L. Ed. 2d 685 (1969), and *Harris* v. *United States*, 390 U. S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1967).

State v. *Torres*, 29 Utah 269, 508 P. 2d 534 (1973), is a recent Utah State Supreme Court decision who

closely parallels the factual situation of the present controversy. The Court rejected appellant's argument that the police did not have probable cause to stop, arrest and search the appellant as follows:

> "When a serious crime has been committed, the law-abiding citizenry should be willing to put up with a moderate amount of inconvenience to cooperate with officers attempting to capture suspects. In some situations it is necessary and therefore justifiable to resort to measures which otherwise might be considered improper intrusions, such as setting up road blocks and checking cars or conveyances in the area. In such exigencies it is essential that a reasonable degree of tolerance be indulged as to the judgment of police officers, so long as they are acting in good faith and within standards of decent and decorous behavior." 508 P.2d at 536.

After certain crimes are committed, it has become established policy for the police to cordon off a given area surrounding the scene of the crime and set up roadblocks to stop all traffic in and out of the area. Such police practices have been held reasonable to facilitate their investigation of the crime. Similarly, officers patrolling the vicinity of a recently committed crime should also be permitted to stop vehicles observed in the area. In *United States ex rel. Farrugian* v. *Bhono*, 256 F. Supp. 391 (D. C. N. Y. 1966), the court held the following:

> "Under New York law, an officer who had been summoned to the scene of a reported crime and saw an automobile parked nearby had the clear right to require the occupant behind the wheel to produce his license and registration."

Few would doubt an officer's authority to stop a person seen walking on a street, late at night, in a direction away from the scene of a crime which had been recently reported. However, when such person happens to be riding in an automobile, it becomes impossible for an investigating officer to speak with them or identify them without asserting authority to stop the car. Thus, it should not seem unreasonable to permit police to stop motor vehicles and inspect driver's licenses as was done by Officer Kelly. This merely places the motorist found in the vicinity in the same position as the pedestrian.

The Court in *Torres, supra,* held that the stopping under exigent circumstances did not constitute an unreasonable search and seizure as defined in Utah Const., Art. I, § 14, and United States Const. Amendment IV.

The next question is whether Officer Kelly's decision to stop the vehicle occupied by appellant for investigative purpose was "reasonable" under the "totality of the circumstances." Respondent submits that it was.

The Court in *Torres* spelled out the test of reasonableness which should be applied on the question as to

whether there has been a violation of one's constitutional rights as follows:

> "[T]hat is, whether fair minded persons, knowing the facts, and taking into consideration not only the rights of the individuals involved in the inquiry or search, but also the broader interests of the public to be protected from crime and criminals, would regard the conduct of the officers as being unreasonable." 508 P. 2d at 536.

See also *Ker* v. *California*, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1962), and *State* v. *Richards*, 26 Utah 2d 318, 489 P. 2d 442 (1971).

From the review of the aforementioned facts, respondent submits that the conduct of Officers Kelly and Smith was reasonable based on the totality of the circumstances.

Respondent further contends that it is in the public interest that police officers be informed of criminal activity in the community, and it is essential for police officers to contact citizens in order to become so informed. Such contact, in the absence of coercion, does not constitute a significant infringement on individual liberty, and the law-abiding citizen should have a desire, if not a duty, to cooperate with the police in protecting his community, and should not be annoyed by reasonable stops made by the police. Respondent therefore concludes that Officers Kelly and Smith lawfully stopped the vehicle occupied by appellant ,and that after the stop,

they obtained sufficient probable cause to arrest appellant and seize the evidence located in the car. Thus, the evidence seized was properly admitted by the trial court.

The final pertinent consideration is that it is primarily the responsibility of the trial court to determine the question of reasonableness and to rule upon the admissibility of evidence. Such judicial rulings are presumed to be correct and should not be disturbed unless it clearly appears that there was error. See *State* v. *Criscola*, 21 Utah 2d 272, 444 P. 2d 517 (1968).

Applying the above principles to the facts of this case, we see nothing which would justify overturning the conviction.

POINT II.

APPELLANT WAS IN NO WAY PREJUDICED AT TRIAL BY THE ADMISSION OF HIS PHOTOGRAPH INTO EVIDENCE.

A brief review of appellant's photograph (State Exhibit No. 8) which was admitted into evidence indicates that there was no prejudice nor inflammatory value derived therefrom. Hence, appellant's contention which isnot suported by any statutory or case law authority appears to be without merit.

The admission of photographs into evidence is properly within the sound discretion of the trial court and the reviewing court should only interfere when manifest

error is shown. In *State* v. *Renzo*, 21 Utah 2d 205, 443 P. 2d 392 (1968), this Court held as follows:

> ". . . It is a matter of discretion with the trial judge to determine whether the probative value of the picture outweighs the possible adverse effect which might be produced upon being shown to a jury. (Citation omitted.) This discretion on the part of a trial judge to admit or reject evidence should not be interferred with by an appellate court unless manifest error is shown." 443 P. 2d at 399.

The state was duty-bound to prove the identity of the assailant and all elements of the crime by whatever evidence was available. This includes photographs. The victim identified the appellant as the individual who committed the robbery from a selection of ten photographs (R. 119-120). The appellant admitted that the photograph was a reasonable facsimile of the way he looked on the night that he was arrested and that there was nothing misleading about the picture (R. 167).

The question as to the propriety of admitting such photographic evidence is largely within the discretion of the trial court. See *State* v. *Johnson*, 25 Utah 2d 46, 475 P. 2d 543 (1970). The admission of the photograph of the appellant and the fact that the victim was able to identify the appellant as the individual who committed the robbery, gave probative value to the other testimony and evidence presented at trial. No inflammatory or

gruesome nature attended the photograph as confirmed by the appellant's own admission (R. 167).

Respondent submits that inasmuch as it does not appear that the trial court abused its discretion in ruling upon the admissibility of the photograph that the ruling should not be disturbed.

POINT III.

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY SUSTAINING THE STATE'S OBJECTION BASED UPON AN EXPRESSION OF LEGAL OPINION.

Appellant contends that the Honorable Joseph G. Jeppson prejudiced the jury by sustaining the State's objection to closin gremarks made by counsel for the appellant.

Utah case law on this point is well established. *State* v. *Jameson,* 103 Utah 129, 134 P. 2d 173 (1943), holds as follows:

> " . . . Both the court and prosecutors should be zealous in protecting the rights of an accused, and should carefully refrain from doing or saying anything which it might be inferred that an unfair advantage was taken of a defendant." 134 P. 2d at 176.

The trial court record indicates that Judge Jeppson seriously adhered to the aforementioned rule (R. 33).

At no time did he comment on the weakness or strength of appellant's evidence.

In Utah, trial judges are not moderators or referees, however they can express themselves on all questions of law that arise in trial regardless of whether or not there is an objection. A judge may assign his reason for the ruling and where such reasoning is based on an expression of a legal opinion or proposition of law, no re-reversible error is committed. See *State* v. *Kallas*, 97 Utah 492, 94 P. 2d 414 (1939).

The remarks of Judge Jeppson, that appellant has called into question, were the result of a ruling that he made pursuant to the State's objection. The Court sustained the objection and said that appellant's statement was unwarranted under the circumstances (R. 33). The statement of the trial court was an accurate statement of the law. (Respondent's Brief, page .....) Further, the judge's remarks were not addressed to the jury. The remark had nothing to do with the character of the defendant or the strength of his case as far as the trial judge was concerned. Thus, it is clear that the ruling byJudge Jepson was not a comment upon the weight of the evidence.

This Court in *State* v. *Kallas*, *supra*, defines the parameter of a trial court judge as follows :

> " . . . In Utah trial judges are not moderators or referees and may express themselves on all questions of law in trial whether arising

> upon exception or otherwise. And they . . . may within reasonable limitations assign their reasons for their rulings; and where their reasoning is based upon an expression of legal opinion, or a proposition of law no reversible error is committed." 94 P. 2d at 426.

The case before this Court is unlike *State* v. *Rosenbaum*, 22 Utah 2d 159, 449 P. 2d 999 (1969), in that at no time did Judge Jeppson direct his remarks to the jury. It was bench's judicial duty to rule on the objection and articulate the basis of its legal opinion. On the other hand, the trial judge in *Rosenbaum* wrongfully gave specific cautionary instructions *directly to the jury* regarding the defense of alibi.

From the foregoing facts it is evidence that Judge Jeppson was merely performing his judicial functions as they related to the resolution of an objection. His statements to counsel were correct and supported the trial court record. At no time did he make prejudicial commenst to the jury regarding weight to be given to appellant's evidence. Therefore, appellant's argument is simply without merit.

CONCLUSION

The physical evidence introduced by the State was the product of a lawful stop, arrest, and search which fully protected appellant's constitutional rights. Therefore, the trial court was correct in admitting the evidence obtained.

Appellant was not prejudiced by the admission of his own photograph nor the court's statement during his closing argument. Such actions are clearly within the trial court's discretion.

Therefore, respondent asks that the judgment of the Third District Court be affirmed.

Respectfully submitted,

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